IN THE SUPREME COURT OF IOWA

NO. 12-2120

CHRISTOPHER J. GODFREY,

PLAINTIFF-APPELLANT,

v.

STATE of IOWA; TERRY BRANSTAD, Governor of the State of Iowa, individually and in his official capacity; KIMBERLY REYNOLDS, Lieutenant Governor of the State of Iowa, individually and in her official capacity; JEFF BOEYINK, Chief of Staff to the Governor of the State of Iowa, individually and in his official capacity; BRENNA FINDLEY, Legal Counsel to the Governor of the State of Iowa, individually and in her official capacity; TIMOTHY ALBRECHT, Communications Director to the Governor of the State of Iowa, individually and in his official capacity; and TERESA WAHLERT, Director, Iowa Workforce Development, individually and in her official capacity,

DEFENDANTS-APPELLEES.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE ROBERT A. HUTCHISON

APPELLANT'S BRIEF

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I. CERTIFICATE OF SERVICE

I, Roxanne Barton Conlin, hereby certify that I mailed one (1) copy of this BRIEF this 21st day of June, 2013, to the following:

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II. CERTIFICATE OF FILING

I, Roxanne Barton Conlin, hereby certify that I filed eighteen (18) copies of this PROOF BRIEF this 21st day of June, 2013, with the Clerk of the Iowa Supreme Court, Des Moines Iowa.

Roxanne Conlin

ROXANNE BARTON CONLIN

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VI. ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction of this matter as it presents a substantial issue of first impression with respect to the evidentiary status of an Attorney General's certification under Iowa Code § 669.5(2)(a). *See,* Iowa App. P. 6.1101(2)(c). The ultimate interpretation of § 669.5(2)(a) will have

substantial constitutional implications, as Plaintiff's due process and equal protection rights with respect to his property interest in his causes of action against the individual Defendants are at issue. *See*, Iowa R. App. P. 6.1101(2)(a). This case also presents a fundamental and urgent issue of broad public importance requiring prompt and ultimate determination by the Supreme Court, in that the determination of whether an Attorney General's certification under Iowa Code § 669.5(2)(a) is conclusive and unreviewable with respect to the employment scope of individual state-employed Defendants, or whether such certification is merely prima facie evidence subject to judicial review, will have a profound effect on the ability of those who are injured by state employees, including Plaintiff, to proceed with legal claims against the individuals responsible for their injuries. *See*, Iowa App. P. 6.1101(2)(d). The Iowa Supreme Court has granted interlocutory review of this matter. (1/2/13 Supreme Court Order, App. 200-01).

VII. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On August 6, 2012, Plaintiff filed an Amended Petition against Defendants. (Amended Petition, App. 1-31). The Amended Petition included claims against the individual Defendants for interference with contractual relations, interference with prospective business advantage, defamation and extortion. *Id.* On August 30,

2012, Deputy Attorney General Jeffrey S. Thompson certified that with respect to the claims made in the Amended Petition, all of the individual Defendants were employees of the State acting within the scope of their office or employment during the time period relevant to this case. (Attorney General's certification, App. 32-33).

On September 14, 2012, Defendants filed a Motion in which they sought to substitute the State of Iowa for the individual Defendants in accordance with Iowa Code § 669.5 for all of the counts added in the Amended Petition. (D's Motion to Substitute, App. 34-37). Plaintiff resisted Defendants' Motion, arguing that the Attorney General's certification served only as prima facie, not conclusive, evidence that Defendants were acting within the scope of their employment. (P's Resistance to D's Motion to Substitute and supporting brief, App. 38-54).

B. DISPOSITION OF THE CASE IN THE DISTRICT COURT

On November 1, 2012, the Iowa District Court for Polk County, the Honorable Robert A. Hutchison presiding, held in part that the Attorney General's certification was conclusive as to the issue and granted Defendants' Motion to substitute the State of Iowa as the sole defendant in Counts VI through XVI of the Amended Petition, dismissing Counts X through XV.[1] Thereafter, Plaintiff filed a

[1] "Defendants' motion to substitute defendant State of Iowa for the individual defendants is granted. The parties have stipulated that in such event Counts X, XI, XII, XIII, XIV and XV must be dismissed. It is so ordered." (11/1/12 District Court Ruling, p. 5, App. 78).

Motion to Expand. (P's Motion to Expand, App. 82-84). On November 19, 2012, the District Court ruled that Plaintiff's assertion that the Court did not address the constitutional argument was "without merit". (11/19/12 District Court Ruling, App. 89-90). However, in doing so, it specifically endorsed the reasoning in *Jones v. University of Iowa, et al.*, 2012 WL 760414 (Iowa Dist Ct.) and refused to consider the matter further. *Id.* On November 30, 2012, Plaintiff filed an application for interlocutory review (Application for Interlocutory Review and supporting brief/amendment brief, App. 91-199), which was granted by this Court on January 2, 2013 (1/2/13 Supreme Court Order, App. 200-01).

VIII. STATEMENT OF FACTS

Plaintiff Christopher J. Godfrey began work in January 2006 as the Interim Workers' Compensation Commissioner for the state of Iowa after his appointment by Governor Tom Vilsack. (Amended Petition, ¶ 17, App. 4). His appointment was confirmed by the Iowa Senate on April 11, 2007. (*Id.*, at ¶ 18, App. 4). After his initial appointment for a partial term expired in 2009, Governor Chet Culver appointed Plaintiff to serve a six-year term, which the Iowa Senate confirmed on March 30, 2009. (*Id.*, at ¶¶ 19, 20, App. 4). Plaintiff's current term is not due to expire until April 30, 2015. (*Id.*, at ¶ 21, App. 4).

Plaintiff's position as Workers' Compensation Commissioner is statutorily mandated by Iowa Code § 86.1 (2011). (Amended Petition, ¶ 22, App. 4). His

duties are statutorily defined. (*Id.*, at ¶ 23, App. 4). Iowa Code § 86.1 establishes a six-year term of office for the Workers' Compensation Commissioner. (*Id.*, at ¶ 24, App. 4). Throughout his employment, Plaintiff's salary was gradually increased until it represented the maximum possible salary for his position. (*Id.*, at ¶¶ 28-35, App. 5). While employed by the State of Iowa, Plaintiff has never been the subject of a disciplinary action. (*Id.*, at ¶ 36, App. 5).

However, in a letter dated December 3, 2010, Defendant Terry Branstad demanded Plaintiff's resignation. (Amended Petition, at ¶ 37, App. 5). Plaintiff refused to resign, because the six-year term to which he was appointed indicated that the Iowa Legislature intended for his position to be non-partisan and insofar as possible insulated from politics. (*Id.*, at ¶ 38, App. 5). At a meeting with Defendants Branstad, Reynolds and Boeyink on December 29, 2010, Defendants again demanded Plaintiff's resignation. (*Id.*, at ¶¶ 39, 40, App. 6). At this meeting, Plaintiff informed Defendants of the many positive improvements he had instituted at the Workers' Compensation Division and agreed to be supportive of the goals espoused by Defendant Branstad insofar as doing so would conform to his duties and responsibilities. (*Id.*, at ¶ 41, App. 6).

Defendants Branstad and Reynolds were inaugurated on January 14, 2011. (Amended Petition, at ¶ 42, App. 6). Plaintiff continued his work as Workers' Compensation Commissioner and received no complaints regarding his

performance. (*Id.*, at ¶ 43, App. 6). However, in July 2011, Plaintiff was again summoned to a meeting with Defendants Findley and Boeyink, political appointees of Defendant Branstad, where Defendants once again demanded his resignation. (*Id.*, at ¶¶ 44, 45, App. 6). Plaintiff again asserted that his position was non-partisan and quasi-judicial in nature. (*Id.*, at ¶ 46, App. 6). He refused to resign. (*Id.*, at ¶ 46, App. 6).

Thereafter, Defendants Findley and Boeyink tried to intimidate and harass Plaintiff into resigning by telling him that his pay would be immediately decreased to the bottom of his pay grade if he refused to resign. (Amended Petition, at ¶ 47, 48. App. 6, 7). Plaintiff again refused to resign on the basis that his position was neither political nor partisan. (*Id.*, at ¶ 47, App. 6). Defendants did not criticize, or even discuss, Plaintiff's work performance either at the July 2011 meeting or the earlier meeting in December 2010. (*Id.*, at ¶ 49, App. 7).

On July 11, 2011, upon returning to his office, Plaintiff confirmed with human resources that his salary had in fact been reduced to $73,250. (Amended Petition, at ¶ 50, App. 7). The Governor lowered Plaintiff's salary from $112,068.84, the highest level allowed, to $73,250, the lowest amount he could be paid. When the Governor and his staff were questioned about their actions, they accused Plaintiff of poor performance. However, Plaintiff's duties and responsibilities have not been reduced in any way and he has continued to perform

his duties in an exemplary manner since the date that his salary was reduced. (*Id.*, at ¶¶ 51, 52, App. 7).

Plaintiff brought a lawsuit against the State and six individuals. (Amended Petition, App. 1-31). Plaintiff sued the individuals for defamation and extortion. (*Id.*, at ¶¶ 136-188, App. 23-20). The individual Defendants sought the certification of the Attorney General that they defamed and extorted Plaintiff in the "scope of their employment". The Attorney General issued such a certification with no notice to Plaintiff, no hearing and no evidence (Attorney General's certification, App. 32-33). Defendants then sought to substitute the State for the individuals and to dismiss the counts for defamation and extortion, which cannot be brought under the Iowa Tort Claims Act. (D's Motion to Substitute, App. 34-37). It is from the District Court's ruling (11/1/12 District Court Ruling, App. 74-81) permitting substitution and dismissal that Plaintiff seeks to appeal.

IX. ARGUMENT

A. THE DISTRICT COURT ERRED IN HOLDING THAT THE ATTORNEY GENERAL'S CERTIFICATION CONCLUSIVELY ESTABLISHES THAT THE INDIVIDUAL DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT DURING THE TIME FRAME RELEVANT TO PLAINTIFF'S CLAIMS.

1. Preservation of Error

On November 30, 2012, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. On January 2,

2013, this Court granted Plaintiff's application. (1/2/13 Supreme Court Order, App. 200-01).

2. Scope of Review

Statutory interpretation is reviewed for errors at law and this Court is not bound by the trial court's interpretation of law. *State v. Booth*, 670 N.W.2d 209, 211 (Iowa 2003); *State v. McCoy*, 618 N.W.2d 324, 324 (Iowa 2000).

3. Argument

a. The *Mills* reasoning is unsound and does not bind the Iowa Supreme Court.

The District Court relied on the decision in *Mills v. Iowa Board of Regents*, 770 F. Supp. 2d 986 (S.D. Iowa 2011) to support its position that the Attorney General's certification regarding the scope of the individual Defendants' employment is conclusive. (11/1/12 District Court Ruling, p. 4, App. 77). In *Mills*, a former state university employee brought an action against the State, the university, the Board of Regents and officials, including claims against individual state employees in their individual capacities, after he was allegedly wrongfully terminated from his employment. *Id.,* at 990. The Court found, under Iowa law, that it was appropriate to substitute the State as a defendant for the individual State employees originally named as defendants in their individual capacities. *Id.*, at 996.

In reaching its conclusion, the Court compared the language of the Iowa Tort Claims Act, Iowa Code § 669.5(2)(a) to the Federal Tort Claims Act, 28 U.S.C. § 2679(d)(1). The Federal Tort Claims Act reads in pertinent part:

> "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant."

28 U.S.C. 2679(d)(1).

The Iowa statute is nearly identical:

> "Upon certification by the attorney general that a defendant in a suit was an employee of the state acting within the scope of the employee's office or employment at the time of the incident upon which the claim is based, the suite commenced upon the claim shall be deemed to be an action against the state under the provisions of this chapter, and if the state is not already a defendant, the state shall be substituted as the defendant in place of the employee."

Iowa Code § 669.5(2)(a).

The significance of this comparison is that the majority of courts have found that the language of the federal statute does not mandate that an attorney general's certification conclusively establishes the scope of office or of a federal government actor's employment. *See,* e.g. *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 435–36 (1995); *Brown v. Armstrong,* 949 F.2d 1007, 1011 n. 5 (8th Cir.1991); *Arbour v. Jenkins,* 903 F.2d 416, 421 (6th Cir.1990), as discussed subsequently.

Thus, the Iowa statute may logically be interpreted in the same way. The difficulty with the District Court's decision to the contrary in the present case, based upon *Mills*, arises when it unnecessarily complicates this straightforward analysis by taking into account the language of 28 U.S.C. § 2679(d)***(2)***, the portion of the federal statute that addresses, not substitution of parties, but ***removal***.

The removal section of the Federal Tort Claims Act states in part: "This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). While this language does, in fact, mandate conclusiveness under circumstances of removal, it does not pertain to the substitution of parties, nor can it be construed to mandate conclusiveness with respect to such. Indeed, the very absence of this language in the Iowa statute supports a finding that conclusiveness is not intended and should not be implied, just as it is not implied in § 2679(d)(1) which addresses substitution. The District Court's finding to the contrary as drawn from *Mills*, is in error. The *Mills* statement that the language of § 669.5(2)(a) is "clear and unambiguous" in providing that an Attorney General's certification conclusively resolves the employment scope issue fails to take into account the clear absence of such a mandate. The Court states that the term "shall" in the Iowa statute creates mandatory conclusiveness . *Id.*, at 995-96. However, the identical word "shall" is used in the federal statute and courts have distinctly refused to hold that this

mandates conclusiveness. *See,* e.g. *Gutierrez de Martinez,* 515 U.S. 417, 435–36 (1995); *Brown,* 949 F.2d 1007, 1011 n. 5 (8th Cir.1991); *Arbour,* 903 F.2d 416, 421 (6th Cir.1990). Despite the absence in the Iowa statute of a section analogous to the federal statute's subsection regarding removal which includes the word "shall", the *Mills* reasoning widens the scope of immunity beyond what the Legislature and the language of the statute intend. The decision is not binding on the Iowa Supreme Court and should not be followed.

Furthermore, use of the word "shall" in a statutory provision does not, alone, mean that the obligation described is mandatory. *Pearson v. Robinson*, 318 N.W.2d 188, 190 (Iowa 1982), citing *Taylor v. Department of Transportation*, 260 N.W.2d 521, 522-23 (Iowa 1977). The Iowa Code generally defines "shall" as imposing a duty. Iowa Code § 4.1(30)(a). However, if a duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory. *Taylor,* 260 N.W.2d 521, 523 (Iowa 1977) (finding that, despite the inclusion of the word "shall" in Iowa Code § 321B.8, the 20-day period specified for holding a revocation hearing was directory rather than mandatory). Additionally, the Iowa Code provides that if a given construction "would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute", the construction need not be strictly applied. *See*, Iowa Code § 4.1.

The Iowa Tort Claims Act gives recognition to and a remedy to a cause of action already existing by reason of a wrong done for which redress could not be previously had because of the common law doctrine of governmental immunity. *Raas v. State*, 729 N.W.2d 444, 447 (Iowa 2007). Within the Act, Iowa Code § 669.5 provides that a state employee must be acting within in the scope of his or her employment in order for the State to be substituted as a party. It stands to reason, then, that conduct triggering substitution must be done within the employment scope, that is, in furtherance of the purpose of the employment. *See, i.e., Merchants National Bank of Cedar Rapids v. Waters*, 447 F.2d 234 (8th Cir. 1971); *Sandman v. Hagan*, 261 Iowa 560, 154 N.W.2d 113 (1967).

Courts consider "the language used, the object to be accomplished, the evils and mischief sought to be remedied, and, if possible, place a construction on the statute which will effect its purpose rather than defeat it". *Pearson*, 318 N.W.2d 188, 190 (Iowa 1982). Thus, use of the word "shall" in Iowa Code § 669.5(2)(a) should not be interpreted to expand the reach of governmental immunity beyond what was legislatively intended, namely, the protection from suit only of those acts done in furtherance of employment purposes. Defamation and extortion do not fit this definition. Even if "shall" were to be construed as mandatory, which it should not be in this case, the only duty created is that which directs the Attorney General to issue employment scope certification. Such a mandate should have no effect on

the ability of the judiciary to review such certifications. Using statutory language to strip the court and the jury of their rightful duties as fact finders in this case could not have been the intent of the Iowa Legislature and should not be the outcome in the resolution of this matter.

b. *Jones* addressed a different constitutional argument than Plaintiff presents in the present case.

In *Jones v. University of Iowa*, et al., 2012 WL 760414 (Iowa Dist. Ct.), the trial order (LACV070820, Sixth Judicial District, Honorable Fae Hoover-Grinde presiding) upon which the District Court also relied in the present case, the defendants moved for summary judgment after the plaintiff brought suit against state and individual defendants for claims related to his employment termination. *Id.* Defendants sought to substitute the State as a defendant in place of the individual state actors, claiming the individual defendants were acting within the scope of their employment, offering an Attorney General's certification as conclusive proof of such. *Id.* The plaintiff countered, arguing that § 669.5 itself violates the Constitution. *Id.* The Court, relying on *Mills,* found for the defendants. *Id.* This case is currently on appeal.

Plaintiff in the present case, however, does not make the same argument. Instead, Plaintiff alleges that Defendants' *interpretation* of the statute would result in a violation of his Constitutional rights, not that the statute is unconstitutional on its face. Thus, the issues in the two cases, while similar at first blush, are

significantly distinct. The conclusion reached in the *Jones* order is inapplicable to the case at bar and is not persuasive authority.

c. <u>The *Heisey* decision is on point and supports Plaintiff's position.</u>

The District Court in this case erroneously disregarded the decision in *State Department of Corrections v. Heisey,* 271 P.3d 1082 (Alaska 2012). It stated that the Alaska statute is closer to the federal statute than Iowa's statute and, therefore, the *Heisey* Court's reliance on federal interpretations of the Federal Tort Claims Act was justified, while in Iowa this would not be the case. (11/1/12 District Court Ruling, pp. 4-5, App. 77, 78) ("[T]he Alaska court relied heavily on the federal court's interpretation of the Federal Tort Claims Act in reaching its decision. Such reliance indicates that the Alaska statute is closer to the federal act than Chapter 669 of the Iowa Code."). This is not accurate.

> Alaska's corresponding statute provides in relevant part:
>
> "Upon certification by the attorney general that the state employee was acting within the scope of the employee's office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon the claim in a state court is considered an action or proceeding against the state under the provisions of this title, and the state is substituted as the party defendant."

Heisey, 271 P.3d 1082, 1086 (Alaska 2012), citing Alaska Statute 09.50.253(c). The primary difference between the federal statute and the Alaska statute is in the verbs used: the former uses "shall be" ("shall be deemed an action against the

United States") and the latter uses "is" ("is considered an action...against the state"). *Id.*, at 1097. The Iowa statute, on the other hand, uses the identical verbiage as the federal statute: "shall". Thus, the state statute more analogous to the federal statute is actually the Iowa statute, not Alaska's statute. The District Court's finding to the contrary is erroneous.

The District Court further observation that, unlike in Iowa, the Alaska court had "extensive" legislative history upon which to base its conclusion, is similarly incorrect. (11/1/12 District Court Ruling, pp. 4-5, App. 77, 78). The *Heisey* Court actually found that the available legislative history was absolutely silent with respect to this issue. *Heisey*, 271 P.3d 1082, 1086 (Alaska 2012). Legislative history, no matter how copious, is of no benefit if it fails to even address the issue. Thus, the District Court's rejection of the *Heisey* decision as support for Plaintiff's position is untenable.

d. The *Berry* decision provides appropriate support for Plaintiff's position.

The District Court's two-sentence dismissal of the *Berry* case is also in error. *See, Berry v. State Dept. of General Services*, 917 P.2d 1070 (Or. Ct. App. 1996). In its Ruling, the District Court states that: "Plaintiff concedes that the Oregon statute is not analogous to the Iowa statute. The Court agrees and finds that *Berry* provides no assistance to Plaintiff." (11/1/12 District Court Ruling, p. 4, App. 77). On the contrary, Plaintiff made no such concession. Plaintiff describes the Oregon

statute "similar to Iowa's and Alaska's" and goes on to cite *Berry* in support of his position. (P's Resistance to D's Motion to Substitute brief, p. 5).

The Oregon statute reads as follows:

> "The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 shall be an action against the public body only. The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action or suit against any officer, employee or agent of a public body whose act or omission within the scope of their [sic] employment or duties gives rise to the action or suit. No other form of civil action or suit shall be permitted. If an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion the public body shall be substituted as the only defendant."

Berry, 917 P.2d 1070, 1071 (Or. Ct. App. 1996), citing Oregon Statute 30.265(1).

The *Berry* Court summed up the statute:

> "The Legislature has thus tied the right to sue a state employee for the employee's torts to whether the employee is entitled to indemnification and a defense from the state under OR 30.285(1) and (2), if the claim arises 'out of an alleged act or omission occurring in the performance of a duty', the employee is entitled to a defense. In that situation, the state is the only proper defendant. On the other hand, if the claim does not arise out of an act or omission in the performance of a duty, the employee is not entitled to a defense and is the only proper defendant. The plaintiff would then be limited to a remedy against the employee individually."

Berry, 917 P.2d 1070, 1071-72 (Or. Ct. App. 1996). The statute is substantially similar to Iowa Code § 669.5(2)(a) on all relevant levels. *Berry* provides appropriate support for Plaintiff's position.

e. <u>The weight of judicial authority favors review of an attorney general's certification as to a state employee's scope of employment.</u>

Of course, federal case law, while persuasive, is not binding on the Iowa Supreme Court. *See, i.e. In re S.A.J.B.*, 679 N.W.2d 645, 648 (Iowa 2004) (discussing constitutional issues); *State v. Paredes*, 775 N.W.2d 554, 561 (Iowa 2009) (discussing rules of evidence) ("Federal case law is not binding, and we are free to develop our own approach to legal questions under the Iowa rule."). *Mills* is a United States District Court decision which interprets state law and is not binding on the Iowa Supreme Court. Moreover, this Court has held that the Iowa legislature intended the Iowa Tort Claims Act to have the same effect as the Federal Tort Claims Act. *Walker v. State*, 801 N.W.2d 548, 566 (Iowa 2011). Thus, a finding in line with the majority of cases is not only entirely sustainable, but is in the best interest of justice, promotes the appropriate role of the judiciary, preserves government integrity and the upholds the rights of those who have been victimized by wrongdoing.

B. THE ATTORNEY GENERAL'S CERTIFICATION THAT AN EMPLOYEE HAS ACTED IN THE SCOPE OF HIS OR HER EMPLOYMENT PURSUANT TO IOWA CODE § 669.5 IS PRIMA FACIE EVIDENCE, AND NOT CONCLUSIVE ON THE QUESTION OF WHETHER THE INDIVIDUAL DEFENDANTS IN THIS CASE WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT WITH RESPECT TO THE INCIDENTS GIVING RISE TO PLAINTIFF'S CLAIMS.

1. Preservation of Error

On November 30, 2012, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. On January 2, 2013, this Court granted Plaintiff's application. (1/2/13 Supreme Court Order, App. 200-01).

2. Scope of Review

Statutory interpretation is reviewed for errors at law and this Court is not bound by the trial court's interpretation of law. *State v. Booth*, 670 N.W.2d 209, 211 (Iowa 2003); *State v. McCoy*, 618 N.W.2d 324, 324 (Iowa 2000).

3. Argument

Plaintiff brings his claims pursuant to the Iowa Tort Claims Act, as his claims are against state officials. *See, Dickerson v. Mertz*, 547 N.W.2d 208, 213 (Iowa 1996). Plaintiff concedes that if this Court finds that all of the individual Defendants' actions were conducted within the scope of their employment, that the State of Iowa should be substituted as the Defendant for those claims. Under the Iowa Tort Claims Act, the state Attorney General can certify that certain actions were within an individual defendant's scope of employment with the State. Iowa Code § 669.5(2)(a). However, nothing in the state statute mandates that such a certification is conclusive with respect to this issue.

The similar section of the Federal Tort Claims Act, 28 U.S.C. § 2679(d)(1) states:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

The statute goes on with respect to removal:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. *This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.*

28 U.S.C. § 2679(d)(2) (emphasis added).

Significantly, the Iowa Tort Claims Act does not have a section analogous to 28 U.S.C. § 2679(d)(2), the section which establishes the conclusiveness of Attorney General certification. Without such language, 28 U.S.C. § 2679(d)(1) implies that an attorney general's certification does not conclusively establish scope of office or employment for purposes of substitution, but only for purposes of removal. *See, e.g., Brown,* 949 F.2d 1007, 1011 n. 5 (8th Cir.1991) ("Despite the seemingly explicit directive, 'Upon certification ... the United States shall be substituted,' most courts have concluded that the language [of the statute] on

balance suggest that Congress did not intend the Attorney General's certification be conclusive on the question of substitution."); *Arbour,* 903 F.2d 416, 421 (6th Cir.1990) ("[T]he scope certification provisions of the Westfall Act as a whole ... [are] ambiguous regarding the reviewability of the Attorney General's scope certification."). This view was affirmed by the United States Supreme Court. *See, Gutierrez de Martinez,* 515 U.S. 417, 435–36 (1995).

Thus, a court confronted with an attorney general's certification under § 2679(d)(1) must treat the certification merely as prima facie evidence that the defendant was acting with the scope of his or her employment, meaning that if the plaintiff "challenges the certification, the district court must independently review the case and determine whether the defendant was in fact acting within the scope of his or her employment." *Anthony v. Runyon,* 76 F.3d 210, 213 (8th Cir.1996), citing *Gutierrez de Martinez,* 515 U.S. 417, 434 (1995).

The courts of Alaska and Oregon have adopted approaches similar to the interpretation advanced by Plaintiff in the case at bar. In *Heisey*, the Supreme Court of Alaska closely examined the issue presently before this Court. *Heisey*, 271 P.3d 1082 (Alaska 2012). Alaska's state tort claim statute is very similar to the Iowa statute. Both are derived from the Federal Tort Claims Act section regarding attorney general certification found at 28 U.S.C. § 2679(d). The Alaska Supreme Court largely relied upon the United States Supreme Court's case law in

determining that the attorney general's certification is reviewable by the court. *Id.*, at 1085. In its analysis, the *Heisey* Court noted that the plain language of the statute does establish that the substitution occurs immediately once a defendant has been certified, but that the statute says nothing about the reviewability of the certification. *Id.*, at 1086. This is precisely the case with Iowa's statute – it is silent on the issue of reviewability. This silence, however, should not be interpreted to deny judicial review and mandate the conclusiveness of such certification.

The *Heisey* Court also advanced the argument that while the Alaska statute, like the Iowa statute, explicitly provides for a review of an attorney general's negative determination, the absence of such a provision for an affirmative decision does not foreclose reviewability, but merely demonstrates the legislature's desire to protect state employees actually acting within the scope of their employment. *Heisey*, 271 P.3d 1082, 1087 (Alaska 2012).

In holding the attorney general's certification reviewable, the *Heisey* Court noted that because it is similar to the Westfall Act, the portion of the Federal Tort Claims Act regarding such certification, federal case law is persuasive. *Id.* It first noted that there is a strong presumption that Congress intends to provide for judicial review. *Id.*, at 1088. This presumption favoring judicial review must be overcome within the statute itself. *Id.* The *Heisey* Court then examined these

decisions and determined that it is the "constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska." *Id.*, at 1089, quoting *K & L Distributing., Inc. v. Murkowski*, 486 P.2d 351, 357 (Alaska 1971).

This situation has also arisen in the Oregon Courts. In *Berry v. State, Dept. of General Services*, the Court of Appeals of Oregon held that because a district court relied on the Attorney General's conclusion rather than its own review, it erred. *Berry*, 917 P.2d 1070, 1074 (Or. Ct. App. 1996). In *Berry*, the defendant argued that the court must accept the attorney general's determination and substitute the state as the sole defendant. *Id.*, at 1072. The court found this position problematic. *Id.* It pointed out that the state tort claims statute, similar to Iowa's and Alaska's, only established procedures for resolving claims between the *employee and the state*. *Id.* (emphasis added). The court goes on to state:

> The plaintiff plays no role in the Attorney General's decision under [Oregon's State Tort Claim Statute] and has no way to challenge it. If Korson's argument were correct and that decision is conclusive, the Attorney General, by an erroneous but unchallengeable decision, could deprive a plaintiff of a substantial remedy against an employee who was not in fact acting in the scope of state employment. There is no discernible state interest in such a result, nor is there any relationship between that result and the purpose of the Act to provide for and regulate state liability for state torts.

Id. (alteration in original).

The court ultimately decided that it would take the attorney general's decision into consideration, but that it did not bind the court. *Berry,* 917 P.2d 1073 (Or. Ct. App. 1996). The court found it important to point out that blindly

accepting the attorney general's certification would foreclose possibly meritorious claims against state defendants in their individual capacities. *Id.* The court stated that it could not dismiss claims against an individual state defendant until it was satisfied that such claims had no basis in law or fact. *Id.* The court held that the lower court erred in not reviewing the attorney general's decision when the plaintiff presented facts that might have entitled him to recover against the state defendant in that defendant's individual capacity. *Id.*

The Iowa Supreme Court has not ruled on the question presented in this appeal, but has stated that scope of employment is ordinarily a matter for the jury or a decision for the court. *Godar v. Edwards,* 588 N.W.2d 701, 706 (Iowa 1999). Given this general policy as a background, Plaintiff urges this Court to adopt an analysis similar to the above-cited Federal Courts, and Alaskan and Oregon Courts, and to treat the Attorney General's certification as merely establishing prima facie evidence that the individual Defendants' conduct was within the scope of their employment. A court of law must consider the evidence and independently decide if there is sufficient evidence, let alone any evidence, to determine if there is justification for the statement that Defendants' actions were within the scope of their employment.

C. THE ISSUE OF WHETHER THE INDIVIDUAL DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AS REFERENCED BY IOWA CODE § 669.5 SHOULD BE SUBMITTED TO A JURY.

1. Preservation of Error

On November 30, 2012, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. On January 2, 2013, this Court granted Plaintiff's application. (1/2/13 Supreme Court Order, App. 200-01).

2. Scope of Review

The District Court's finding that an Attorney General's certification of employment scope pursuant to Iowa Code § 669.5(2)(a) is conclusive and not subject to judicial review infringed upon Plaintiff's fundamental right to a trial by jury on this issue. *See,* Iowa Const., Article 1 § 9. Appellate courts review constitutional claims de novo. *State v. Harris*, 741 N.W.2d 1, 4 (Iowa 2007).

3. Argument

Whether a particular act or omission falls within an individual's scope of employment is a fact-based determination and, as such, should be decided by a This is true, not only with respect to cases brought pursuant to the Iowa Civil Rights Act, Iowa Code Chapter 216, but to cases, such as the one at bar, involving the Iowa Torts Claim Act. For example, in *Dobratz v. Krier*, 808 N.W.2d 756 (Iowa Ct. App. 2011) (unreported), an Iowa State University professor filed an internal complaint against several of his superiors alleging misconduct. *Id.,* at 1*. After a faculty review board and the university provost dismissed the complaint,

one of the individuals against whom the professor had filed the complaint sued the professor alleging abuse of process. *Id.* A jury found for the defendant professor, but the district court granted the plaintiff's motion for judgment notwithstanding the verdict, finding that the university's complaint procedure was not a "legal process" encompassed by the abuse of process tort. *Id.*, at 2*. During the course of the appeal, a deputy attorney general certified that the individual defendant was acting within the scope of his employment. *Id.*, at 2*, n.2. The defendant then answered and asserted the affirmative defense that he was "acting in the scope of his employment as an employee of the State of Iowa when the incidents relating to Plaintiffs' abuse of process claim occurred." *Id.* That is precisely the same strategy Defendants employed in this case.

In *Dobratz*, the court submitted the defendant's scope-of employment defense to the jury and instructed the jury that damages were recoverable only if plaintiffs proved Krier "was acting outside the scope of his employment...when he filed his complaints..." *Dobratz*, 808 N.W.2d 756, 2* (Iowa Ct. App. 2011) (unreported). The District Court ruled that the scope-of-employment issue "was factually based, and, as such, the decision in that regard belonged to the jury." *Id.* The Court of Appeals ultimately declined to review this issue as the appeals case was decided on the basis of "abuse of process." *Id.* However, the Court of Appeals did not object to the procedure used by the lower court in *Dobratz*. *Id.*

Moreover, the Court of Appeals specifically noted, as many other Iowa Courts have done, that the scope-of-employment issue is factually based, and its ultimate decision lies with the jury. *Dobratz*, 808 N.W.2d 756, 2* (Iowa Ct. App. 2011) (unreported). Under Iowa law, the question of whether an act is within the scope of employment within the meaning of the ITCA is ordinarily a jury question. *Godar,* 588 N.W.2d 701, 705 (Iowa 1999), quoting *Sandman*, 261 Iowa 560, 154 N.W.2d 113, 118 (1967); *Kent v. Iowa*, 651 F. Supp. 2d 910, 955-56 (S.D. Iowa 2009).

For an act to be within the scope of employment, the conduct complained of "must be of the same general nature as that authorized or incidental to the conduct authorized". *Godar*, 588 N.W.2d 701, 705 (Iowa 1999), quoting *Sandman*, 261 Iowa 560, 567, 154 N.W.2d 113, 117 (1967). An act is deemed to be within the scope "when such act is necessary to accomplish the purpose of the employment and is intended for such purpose". *Id.*, quoting *Sandman*, 261 Iowa 560, 566-67, 154 N.W.2d 113, 117 (1967). The question is whether an employee's conduct "is so unlike that authorized that it is 'substantially different'". *Godar*, 588 N.W.2d 701, 706 (Iowa 1999), quoting *Sandman*, 261 Iowa 560, 567, 154 N.W.2d 113, 117 (1967).

Section 229(2) of the Restatement (Second) of Agency lists the following factors to be considered in determining whether the conduct of an employee may

be characterized as occurring within the scope of employment: (a) whether or not the act is one commonly done by the servant; (b) the time, place and purpose of the act; (c) the previous relations between the master and the servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether or not the act is outside the enterprise of the master, or if within the enterprise, has not been entrusted to any servant; (f) whether or not the master has reason to expect that such an act will be done; (g) the similarity in quality or the act done to the act authorized; (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal. *Godar*, 588 N.W.2d 701, 706 (Iowa 1999), citing Restatement (Second) of Agency, § 229(2) (1957).

This scope of employment analysis is incredibly fact specific. It is hard to imagine that the legislature would have intended that such a finding be made conclusively through an attorney general's certification with absolutely no judicial oversight. The very function of a jury is to sort out the evidence and place credibility where it belongs. *State v. Hunt* 801 N.W.2d 366, 377 (Iowa Ct. App. 2011) (citation omitted). Thus, it is for the jury to evaluate and weigh the entirety of the evidence, of which the attorney general's certification is merely one

and to decide whether Defendants' individual actions were within the scope of their employment.

The Attorney General's certification represents testimony evidence and as such, must be submitted to the jury. A jury should be at liberty to believe or disbelieve testimony of witnesses as it chooses and give weight to the evidence as it sees fit. *See, State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984) (citation omitted).[2] Any time that facts are susceptible to different inferences, the question becomes one for the jury. *See, State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984) (citation omitted). Even testimony that is uncontroverted may be rejected by the jury. *Jackson v. Roger*, 507 N.W.2d 585, 589 (Iowa Ct. App. 1993), citing *Eickelberg v. Deere*, 276 N.W.2d 442, 447 (Iowa 1979). Indeed, a trial court has a duty to submit to the jury ***all*** issues presented in the pleadings for which supportive evidence exists. *Miller v. International Harvester Co.*, 246 N.W.2d 298, 300 (Iowa 1976) (emphasis added). The issue of employment scope is a contested factual matter and central to the issue of the individual Defendants' liability. Thus, the jury has the right to consider all of the evidence available. *See, Silvia v. Pennock*, 253 Iowa 779, 113 N.W.2d 749, 753-54 (1962) (examining conclusive nature of prior testimony of personal injury plaintiff). Unless testimony has the

[2] Even characterizing attorney general testimony as "expert" would not exempt it from the jury's review. The facts surrounding whether the individual employees were acting within their employment scope are in dispute. Such disputes concerning the foundational facts for the testimony of expert witnesses are matters for the jury to decide. *State v. Kolbet*, 638 N.W.2d 653, 660 (Iowa 2001) (citations omitted).

force of a judicial admission, it is ordinarily no more conclusive than any other evidence and it is the duty of the jury to determine the facts, not alone from such testimony, but from all of the evidence considered as a whole. *Id.* The Attorney General's testimony in this case is no exception.

D. DEFENDANTS' INTERPRETATION OF IOWA CODE § 669.5 WOULD RESULT IN AN UNCONSTITUTIONAL DEPRIVATION OF PLAINTIFF'S DUE PROCESS RIGHTS.

1. Preservation of Error

On November 30, 2012, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. On January 2, 2013, this Court granted Plaintiff's application. (1/2/13 Supreme Court Order, App. 200-01).

2. Scope of Review

The District Court's decision to allow Defendants to substitute the State as a party in place of the individual Defendants infringed upon Plaintiff's fundamental property interest in his causes of action against the individual Defendants in violation of the procedural due process provision of the Iowa Constitution. Constitutional claims are reviewed de novo. *State v. Harris* 741 N.W.2d 1, 4 (Iowa 2007).

3. Argument

To find the Attorney General's certification on the matter of employment scope conclusive and judicially unreviewable would result in an unconstitutional deprivation of Plaintiff's due process rights. Plaintiff has a vested property interest in his causes of action against the individual Defendants. Should the State be substituted for these Defendants, Plaintiff will lose, not only the ability to hold the responsible wrongdoers accountable, but will be forced to forfeit those causes of action, such as defamation and extortion, that cannot be brought against the State. To accept the Attorney General's certification as final on the scope of employment issue guarantees that Plaintiff will suffer such losses.

The Fourteenth Amendment to the United States Constitution prohibits any state from depriving any person of property "without due process of law". U.S. Const., Art. 14. Similarly, Article 1, Section 9 of the Iowa Constitution provides that "no person shall be deprived of ...property without due process of law." Iowa Const., Art. 1, § 9. Property rights are fundamental primarily because they have this textual recognition in the due process clauses themselves. *State v. Hartog*, 440 N.W.2d 852, 854 (Iowa 1989); Iowa Const., Amend. 14. "Fundamental rights" are those found to be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty". *Hensler v. City of Davenport*, 790 N.W.2d 569, 581(Iowa 2010), citing *Chavez v. Martinez*, 538 U.S. 760, 775 (2005).

In Iowa, when a wrongful act or omission results in loss or damage to a plaintiff, a cause of action accrues. *Bob McKiness Excavating & Grading, Inc. v. Morton Buildings, Inc.*, 507 N.W.2d 405, 408 (Iowa 1993). Once a cause of action accrues, a plaintiff is in possession of a vested property right. *Id.*, at 410 (citations omitted); *see also, Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457, 462-63 (Iowa 1989) ("There is a vested right in an accrued cause of action...", holding in part that the retroactive application of Iowa's dramshop amendment which deprived plaintiff of her vested rights in a cause of action against defendants violated due process).

"Accrual" of a cause of action means the right to institute and maintain an action for enforcement. *Resolution Trust Corp. v. Fleischer,* 892 P.2d 497, 502 (Kan. 1995). "The right to a cause of action has long been held to be a protected property interest." *Id.*, at 500 (quotation omitted). The United States Supreme Court has suggested that accrued causes of action are a "species of 'property' protected by the Fourteenth Amendment's Due Process Clause" and has noted that "[a]rguably a state tort claim is [such] a species of property protected by the Due Process Clause". *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), quoting *Martinez v. California*, 444 U.S. 277, 281-82 (1980).

As the Tennessee Supreme Court has observed: "A vested right of action is as much property as are tangible things...and enjoy the full protection of the due

process clauses of the Federal and State Constitutions." *Mills v. Wong*, 155 S.W.3d 916, 921 (Tenn. 2005) (finding a vested right of action in tort is a cause of action which has accrued and may be classified as a constitutionally protected property interest) (citation omitted). *See also, Holt v. State Farm Fire & Casualty Co.*, 627 F.3d 188, 193 (5th Cir. 2010) (when a party acquires a right to sue for a cause of action, that right becomes a vested property right and is protected by due process guarantees), accord, *Falgout v. Dealers Truck Equipment Co.*, 748 So. 2d 399, 407 (La. 1999); *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 146 P.3d 423, 434 (Wash. 2006) (an accrued cause of action based upon common law principles is a vested right); *Wiley v. Roof*, 641 So. 2d 66 (Fla. 1994) (plaintiff's right to commence action is a valid and protected property interest); *Cook v. Matrejs*, 383 N.E.2d 601, 604 (Ohio 1978) (an accrued cause of action is a vested right).

Under the procedural due process provision of the Iowa Constitution's Fourteenth Amendment, notice and an opportunity to be heard are required when an individual's property interests are at stake. *Lewis v. Jaeger*, 818 N.W.2d 165, 181 (Iowa 2012) (discussing real property), citing *War Eagle Village Apartments v. Plummer*, 775 N.W.2d 714, 719 (Iowa 2009); *F.K. v. Iowa District Court*, 630 N.W.2d 801, 808 (Iowa 2001).

Other courts have found specifically that barring judicial review of an attorney general's certification of employment scope has adverse constitutional implications regarding the duty of the Court. In *Heisey*, the Supreme Court of Alaska found that courts should be able to review the attorney general's decision, as courts have a constitutionally vested duty to insure compliance with the laws. *Heisey,* 271 P.3d 1082, 1089 (Alaska 2012). In explaining its reasoning, the Court stated:

> It is the constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska. We would not be able to carry out this duty to protect the citizens of this state in the exercise of their rights if we were unable to review the actions of administrative agencies simply because the legislature chose to exempt their decisions from judicial review. The legislative statement of finality is one which we will honor to the extent that it accords with constitutional guarantees. But if the administrative action is questioned as violating, for example, the due process clause, we will not hesitate to review the propriety of the action to the extent that constitutional standards may require.

Id., quoting *K & L Distributing., Inc.,* 486 P.2d 351, 357 (Alaska 1971) (invalidating state statute as unconstitutional which specifically denied review of administrative action).

Similarly, in *Berry*, the Court of Appeals of Oregon found that not allowing courts to review an attorney general's certification of scope of employment would be potentially unconstitutional. *Berry*, 917 P.2d 1070, 1072 (Or Ct. App. 1996). In that case, a former state employee sued the state and a personnel manager for injuries arising out of his employment termination. *Id.*, at 1071. The trial court

allowed the state to be substituted as the sole defendant and dismissed the claims against the manager. *Id.* The appellate court held that the attorney general's determination that the manager had acted within the scope of his employment so as to be entitled to a defense was not conclusive. *Id.*

As is the case in Iowa, the Oregon legislature has tied the right to sue a state employee for the employee's torts to whether the claim arises out of an alleged act or omission accruing in the performance of his or her job duties. *Berry*, 917 P.2d 1070, 1071 (Or. Ct. App. 1996); ORS 30.285(1) and (2). It stated:

> "If [the defendant's] argument were correct and that [employment scope] decision is conclusive, the attorney general, by an erroneous but unchallengeable decision, could deprive a plaintiff of a substantial remedy against an employee who was not in fact acting in the scope of state employment. There is no discernable state interest in such a result, nor is there any relationship between that result and the purpose of the Act to provide for and regulate state liability for state torts...Making the attorney general's decision conclusive on the plaintiff could well grant state employees the very immunity that the legislature did not intend to extend to them."

Berry, 917 P.2d 1070, 1072 (Or. Ct. App. 1996). Based upon the property right at issue represented by the plaintiff's cause of action, the *Berry* Court decided that it must consider the same issues that the attorney general considered in determining scope of employment issues, but that, significantly, the attorney general's decision would not bind the Court. *Id.*, at 1073 (Or. Ct. App. 1996).

Defendants' interpretation of Iowa Code § 669.5(2)(a) in the present case would result in an infringement of Plaintiff's fundamental property interest in his

causes of action against the individual Defendants without serving a compelling governmental interest. If a government action implicates a fundamental right, courts must apply a strict scrutiny substantive due process analysis. *Hensler,* 790 N.W.2d 569, 580 (Iowa 2010). While a limited scope of governmental immunity is a clearly a legitimate interest, Defendants' interpretation of § 669.5(2)(a) would expand this immunity further than the Legislature intended and, as a result, would impermissibly subvert Plaintiff's constitutional guarantee of due process rights.

A legislature may not extinguish a right of action that has already accrued to a plaintiff. *See, Dolezal v. Boches*, 602 N.W.2d 348, 351 (Iowa 1999), citing *Thorp*, 446 N.W.2d 457, 461 (Iowa 1989). If Defendants' interpretation is deemed correct, § 669.5(2)(a) would operate to extinguish plaintiffs' rights to causes of action that have arguably arisen outside of a state-employed tortfeasor's employment scope. This is not an acceptable, just or constitutional result. Thus, Iowa courts should maintain the power of review over an Attorney General's certification under such circumstances to the extent that constitutional standards require.

E. ALTERNATIVELY, THE ISSUE OF WHETHER INDIVIDUAL DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AS REFERENCED BY IOWA CODE § 669.5 SHOULD BE ADJUDICATED BY A COURT OF LAW.

1. Preservation of Error

On November 30, 2012, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. On January 2, 2013, this Court granted Plaintiff's application. (1/2/13 Supreme Court Order, App. 200-01).

2. Scope of Review

The District Court's finding that the Attorney General's certification of employment scope pursuant to Iowa Code § 669.5(2)(a) is conclusive and not subject to judicial review infringed upon Plaintiff's fundamental right to have this issue heard by a court of law. Iowa Const., Article 1 § 9. Appellate courts review constitutional claims de novo. *State v. Harris*, 741 N.W.2d 1, 4 (Iowa 2007).

3. Argument

The scope of employment issue has generally been found to be a jury question. *Godar,* 588 N.W.2d 701, 705 (Iowa 1999), quoting *Sandman*, 261 Iowa 560, 154 N.W.2d 113, 118 (1967); *Kent*, 651 F. Supp. 2d 910, 955-56 (S.D. Iowa 2009). Alternatively, depending on the surrounding facts and circumstances of a particular case, the question as to whether an employee's act falls within the scope of employment is for the court to decide. *Id.* Under the Iowa Tort Claims Act, the district court is given the power to "hear, determine, and render judgment on any suit or claim as defined in this chapter". Iowa Code § 669.4. For example, while the Attorney General is authorized to settle ITCA claims, it must have the approval

of the court in which the suit is pending. Iowa Code § 669.9. Judicial review is a fundamental aspect of the Act's exhaustion of administrative remedies Iowa Code § 669.5(1).

Similarly, Iowa Code § 17A.19 contains a strong presumption of reviewability of agency action.[3] Indeed, if a statute fails to expressly preclude judicial review, the presumption of reviewability controls. *Richards v. Iowa Dept. of Finance*, 454 N.W.2d 573, 575 (Iowa 1990) (finding that a party aggrieved by agency action upholding tax exemption is entitled to judicial review upon exhausting administrative remedies). From exhaustion of administrative remedies requirements to matters of statutory interpretation, judicial review is either expressly provided for or presumed available.[4] To find an Attorney General's certification conclusive as to employment scope under § 669.5(2)(a), as Defendants urge, would be to ignore the important underlying policy consideration central to this case - the strong presumption favoring judicial review. *See, Gutierrez de Martinez,* 515 U.S. 417, 424 (1995). Unlike in some other states, government liability is the ***rule*** in Iowa, while immunity is the exemption. *Walker*

[3] "A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter." Iowa Code § 17A.19; *Richards v. Iowa Dept. of Revenue and Finance,* 454 N.W.2d 573, 575 (Iowa 1990).

[4] See, i.e. *Iowa Ag. Cont. Co. v. Iowa State Board of Tax Review*, 723 N.W.2d 167, 173 (Iowa 2006) (although court may give weight to an agency's statutory interpretation, the meaning of a statute is always a matter of law for the Supreme Court to determine); *Second Injury Fund of Iowa v. George*, 737 N.W.2d 141, 146 (Iowa 2007) (reviewing workers' compensation commissioner's interpretation of Iowa Code § 85.64).

v. State, 801 N.W.2d 548, 555 (Iowa 2011) (emphasis added). Factual circumstances affecting the immunity of state actors must be decided in a court of law.

Moreover, public policy requires that the issue of whether Defendants were acting within the scope of their employment be subject to adjudication by a jury or by the Court. A fact finder must determine questions of fact and weight of the evidence. *State v. Fields*, 199 N.W.2d 144, 147 (Iowa 1972); *In re Detention of Pierce*, 748 N.W.2d 509, 514 (Iowa 2008). It is highly improper for a state official, with no avowed knowledge of the specific facts in this case, to make an unsupported statement with respect to whether the challenged actions of state actors fell within the scope of their employment and to delineate that statement as conclusive on the issue. The Attorney General's unsupported, one-paragraph certification in this case which nakedly asserts that the individual Defendants in this case were acting within the scope of their employment should not be exempt from judicial scrutiny.

While Plaintiff has no reason to doubt the attorney general's motivations or work product, Mr. Thompson only cursorily stated that "[w]ith respect to the claims made in the Amended Petition...[the individual defendants] were employees of the State, acting within the scope of their office or employment." (Attorney General's certification, ¶1, App. 32). He does not list the claims, nor

does he provide any justification or evidence for his determination. *Id.* Plaintiff has a right to know what justification exists, if any, for the assertion that defamation and extortion are within a government official's "scope of employment."

Without any opportunity for independent review of this conclusion, there is theoretically nothing preventing an attorney general from making such a certification for improper reasons. Furthermore, without review, this kind of certification creates the impression that the State Government is conspiring to deprive individuals of the right to redress the wrongs committed against them by government officials. Mr. Thompson, while testifying in his capacity as a representative of the Attorney General's office, is nonetheless, not exempt from possible bias, either genuine or perceived. "Case law recognizes the slanting effect on human testimony of the witness's emotions or feelings towards the parties or the witness's self-interest in the outcome of the case." *State v. Campbell*, 714 N.W.2d 622, 630 (Iowa 2006) (criminal case discussing the constitutional right to show the bias of government witnesses). It is the province of the jury to weigh his testimony accordingly.

If this Court affirms the decision of the District Court, the very real result is that individuals employed by the State of Iowa will be permitted to defame others without consequence. This creates the impression that if a government official

does harm to the citizenry or violates a citizen's rights on an individual basis, the government may then conspire to ensure that any claims that may result never go before a court for ultimate and fair determination. As previously discussed, the Supreme Court of Alaska has also addressed such policy reasons for holding that an attorney general's certification is reviewable similar to those advanced by Plaintiff. *Heisey*, 271 P.3d 1082, 1089-90 (Alaska 2012). It noted that courts cannot carry out their duty to protect the citizens of their state in the exercise of their rights if they are unable to review the actions of administrative agencies simply because the legislature chooses to exempt their decisions from judicial review. *Id.,* at 1089. It further stressed that it agrees with the United States Supreme Court that not permitting judicial review would lead to "ominous" consequences more severe than the alternative. *Id.* In *Heisey*, the Court cited the United State Supreme Court Case of *Gutierrez de Martinez*, which states:

> The local United States Attorney, whose conflict of interest is apparent, would be authorized to make final and binding decisions insulating both the United States and federal employees ... from liability while depriving plaintiffs of potentially meritorious tort claims.... Nor should we assume that Congress meant federal courts to accept cases only to stamp them "Dismissed" on an interested executive official's unchallengeable representation. The statute is fairly construed to allow petitioners to present to the District Court their objections to the Attorney General's scope-of-employment certification, and we hold that construction the more persuasive one.

Heisey, 271 P.3d 1082, 1088-89 (Alaska 2012), quoting *Gutierrez de Martinez*, 515 U.S. 417, 436-37 (1995).

The Supreme Court of Alaska noted that not allowing reviewability of the attorney general's decision "would allow the Attorney General to be the final arbiter of a case-dispositive issue, contrary to the presumption of judicial review." *Id.* And ultimately the *Heisey* Court held that "[i]n the absence of clear legislative intent to the contrary, and to avoid any due process concerns, we hold that the Attorney General's certification is reviewable." *Id.* (alteration in original). Similarly, Iowa Courts have frequently held in other contexts that the scope of employment determination is best reserved for the jury, and in some limited circumstances, the Court. *See, Godar*, 588 N.W.2d 701, 706 (Iowa 1999). Thus, the District Court's decision to grant Defendants' Motion with respect to this issue is counter to the precedent set with respect to factual determinations and the corresponding role of the judiciary.

X. CONCLUSION

The District Court's decision has deprived Plaintiff of substantial rights – the right to a full remedy for the injuries he has suffered as a result of the individual Defendants' conduct and the right to constitutional due process with respect to the deprivation of a property interest. Due to the importance of providing Plaintiff an appropriate remedy against the rightful Defendants, Plaintiff respectfully requests that this Court find that the Attorney General's certification with respect to

employment scope is not conclusive evidence of such, but prima facie evidence subject to judicial review.

The Iowa Tort Claims Acts is analogous to the Federal Tort Claims Act in the respective code sections pertinent to the resolution of this matter. In the interpretation of the Federal Tort Claims Act, federal Courts have held that without the modifying language in the second subsection, attorney general certifications should be treated as merely prima facie evidence that a government official's actions were within the scope of employment. Thus, such a certification is not conclusive with respect to this issue. It is within the province of the Iowa Supreme Court to render an ultimate decision and to allow Plaintiff to proceed with the appropriate claims against the appropriate Defendants. Those, including Plaintiff, who have been aggrieved by the wrongful conduct of state actors have the right to be made whole by holding such individuals accountable for their unlawful conduct.

Defamation and extortion, as alleged in Plaintiff's Amended Petition, should not be considered part of a government officials "scope of employment" and such a factual determination should not be made outside of the judicial arena. In every other context, the issue of "scope of employment" is ultimately left up to a jury or the court. Public policy and the interests of justice dictate that the determination of appropriate defendants under such circumstances should not be left to a state

which is clearly not in a position to render an unbiased opinion with respect to state actors as defendants in civil matters.

To ensure a fair and just result, this Court, similar to the Oregon and Alaska courts, should mandate either a jury determination or an independent judicial review of Attorney General certifications to ensure that there exists sufficient justification for determinations contained therein and to guard against the appearance of impropriety within the State Government of Iowa. It is the courts' constitutionally vested duty to ensure that administrative actions comply with the laws.

Plaintiff, and others similarly situated, have a property interest in a possible remedy against individual Defendants who could be found by a jury or the Court to have acted outside of the scope of their employment. Defendants' interpretation of § 669.5(2)(a) would result in an infringement of Plaintiff's fundamental property interest in his causes of action against the individual Defendants without serving a compelling governmental interest, in violation of Plaintiff's due process and equal protection rights under the Iowa Constitution.

For all of these reasons, Plaintiff strongly urges this Court to find that the District Court erred in granting Defendants' Motion with respect to this issue and to further find that judicial review of Attorney General certification regarding employment scope pursuant to Iowa Code §669.5(2)(a) is required.

XI. REQUEST FOR ORAL ARGUMENT

Plaintiff hereby requests oral argument.

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6/21/13

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